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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1555

STATE OF TENNESSEE

Petitioner

VS.

RUSSELL KEITH BERRY,

Respondent.

~~REPLY~~ BRIEF IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF

THE STATE OF TENNESSEE

JAMES T. BOWMAN
Attorney for Respondent
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Johnson City, TN 37601
(615) 928-6561

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ATTORNEY AT LAW
305 N. ROAN STREET
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CITATIONS

Cases: Page

Brewer v. Williams, 430 U.S. 387 (1977).....1,2

Massiah v. United States, 377 U.S. 201 (1964).....1,2

State v. Berry, 592 S.W. 2d 553 (Tenn. S. Ct. 1980).....1

State v. Innis, 391 A.2d 1159 (R.I. 1978).....1

State v. Travis, 360 A. 2d 548 (R.I. 1976).....1

United States v. Henry, 590 F. 2d 544 (4th Cir. 1978).....1

Constitutional and Statutory Provisions

United States Constitution

Sixth Amendment 1

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The respondent Russell Keith Berry respectfully prays that the Court decline to issue a writ of certiorari to review the judgment and opinion of the Supreme Court of Tennessee entered in this proceeding on January 7, 1980.

STATEMENT OF THE CASE

The petitioner has accurately stated the factual situation in its Statement of the Case except that the petitioner's insistance that Sheriff Colyer's promise not to interrogate the defendant related only to the time period of the trip from Nashville to Greeneville is not supported by the record. As set out in the record (R 530-531) the promise not to interrogate was a blanket promise.

The Supreme Court of Tennessee found not only that the Sheriff had promised not to interrogate the respondent, but that at the time he made this promise that he, the Sheriff, knew that plans had previously been made to place an undercover agent in the cell with the respondent when he reached Greeneville. The Court found that the State had made a commitment not to interrogate the respondent and that it reneged on that promise to defense counsel. Additionally, the Supreme Court found that notwithstanding the States insistance that the purpose of the "interrogation" was to investigate threats that the respondent had made against one of the investigating officers, that there was scant proof that there was any basis for this investigation. State v. Berry 592 S.W. 2d 553 (Tenn. S. Ct. 1980).

ARGUMENT

Interrogation of a defendant after indictment in the absence of counsel is a violation of the defendant's Sixth Amendment right to the assistance of counsel. Massiah v. United States 377 U. S. 201 (1964); Brewer v. Williams, 430 U.S. 387 (1977); United States v. Henry, 590 F. 2d 544 (4th Cir. 1978); State v. Innis, 391 A. 2d 1159 (R.I. 1978); State v. Travis, 360 A. 2d 548 (R.I. 1976). The State seeks to circumvent this clear proscription by arguing that

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Berry was not interrogated. The Supreme Court of Tennessee very clearly held to the contrary in this case.

> "In light of the authorities discussed herein we conclude that there was a form of interrogation."

The State's handling of the matter is cast in even worse light in view of the Sheriff's solemn avowal to defense counsel that Berry would not be questioned. In response to a question by counsel at trial the Sheriff said:

> "Yes, I agreed - I believe that I told you that he wasn't going to question him - that we wasn't questioning him at that time, I believe." (R 530)

Notwithstanding all other arguments that representation alone should prohibit the use of any statements obtained in violation of the agreement.

Brewer v. Williams, 430 U.S. 387 (1977) is as close to this case factually as any case in the Massiah line. Both cases involved a deliberate attempt to elicit information from a defendant preceded by an agreement with defense counsel that no interrogation would take place. At least in Brewer the attempt was made by a person known by the defendant to be a police officer.

The State's alternate justification for their activities is that the undercover agent was investigating another crime. Respondent agrees that the law permits investigation of other crimes, but the evidence in this case rather clearly suggests that the other crime theory was a mere excuse. The basis for this investigation was that some two months before the defendant threatened to sue one of the investigators. The Supreme Court of Tennessee was unimpressed with the evidence of so-called threats to agent Baird.

> "We find scant proof of any threats made to or about Agent Baird."

The purpose of the interrogation was quite clearly to gather evidence in a manner prohibited by Massiah v. United States and Brewer v. Williams.

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CONCLUSION

Wherefore respondent prays that the Writ of Certiorari filed by the State of Tennessee be denied.

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Attorney for Respondent
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CERTIFICATE OF SERVICE

I, James T. Bowman, attorney for Russell Keith Berry, respondent herein, hereby certify that on the 17 day of June, 1980, I served copies of the foregoing Reply Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Tennessee, Motion to Proceed in Forma Pauperis and Motion for Extension of Time with attached Affidavits by mailing copies thereof, in a duly addressed envelope, with postage prepaid, to William M. Leech, Jr., Attorney General & Reporter and Robert Louis Jolly, Jr., Senior Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219.

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Petitioner	]	
	]	No. 79-1555
V.	]	
	]	
RUSSELL KEITH BERRY,	]	
	]	
Respondent.	]	

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, Russell Keith Berry asks leave to file the attached Reply Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Tennessee without prepayment of costs and to proceed in forma pauperis. The respondent's affidavit in support is attached hereto.

Dated: June 17, 1980

James T. Bowman

JAMES T. BOWMAN
Attorney for Respondent
305 North Roan Street
Johnson City, TN 37601

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STATE OF TENNESSEE,	]
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	]
V.	]
	]
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	]
Respondent.	]

AFFIDAVIT

I, JAMES T. BOWMAN being duly sworn and make oath and say that:

1. I am the attorney for the respondent, Russell Keith Berry.

2. Enclosed with this Motion For An Extension of Time is the Reply Brief of the respondent. I have also filed on the respondent's behalf a Motion to Proceed in Forma Pauperis, however, the respondent who is incarcerated in the state penitentiary in Nashville has not yet returned to me his Affidavit in support of the Motion to Proceed in Forma Pauperis.

3. It is for this reason that the application for extension of time is made.

James T. Bowman

JAMES T. BOWMAN
Attorney for Respondent
305 North Roan Street
Johnson City, Tennessee 37601

Sworn to and subscribed before me this the 17 day of June, 1980.

Joni L. Stuart
NOTARY PUBLIC

My Commission Expires:
4-29-84

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IN THE SUPREME COURT OF THE UNITED STATES

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	]	79-1555
V.	]	
	]	
RUSSELL KEITH BERRY,	]	
	]	
Respondent.	]	

AFFIDAVIT IN SUPPORT OF
MOTION TO PROCEED IN FORMA PAUPERIS

RUSSELL KEITH BERRY, being duly sworn, deposes and says:

1. I am the respondent in this cause.

2. Because of my poverty I am unable to pay the costs of this cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said cause.

5. The nature of said cause is briefly stated as follows:

The Supreme Court of Tennessee reversed my conviction for First Degree Murder and the State of Tennessee has petitioned this Honorable Court for a Writ of Certiorari.

Russell Keith Berry
RUSSELL KEITH BERRY

Sworn to and subscribed before me this the 23 day of JUNE, 1980.

Phyllis E. Bowman
NOTARY PUBLIC
comm EXPIRES 4-18-82

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	)	
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	)	79-1555
RUSSELL KEITH BERRY,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I, James T. Bowman, attorney for the respondent, certify that I have served a copy of the foregoing affidavit in support of motion to proceed in Forma Pauperis upon Robert L. Jolley, Jr., Assistant Attorney General of Tennessee, by mailing a copy thereof to him at his office at 450 James Robertson Parkway, Nashville, Tennessee, 37219.

James T. Bowman

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